RECENT A-76 PROTEST ISSUES

AIR FORCE CIVIL ENGINEERING
SUPPORT AGENCY WORKSHOP

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Thomas L. McGovern

Lt Col, USAFR

OVERVIEW

- **Defining the Workscope -- Bundling**
- **Selecting Contract Type: FFP Contracts**
- **“Competitive Method”: Best Value**
- **Evaluation Process: Cost Adjustments**
- **Who Evaluates?: Conflicts of Interest**
- **Procedural Inefficiencies**
- **Fair Act Appeals**
- **Employee/Union Protests**

DEFINING THE WORKSCOPE

- **Bundling: difficulty defining the workscope**
- **Bundled-Workloads = Administrative Cost Savings**
- **1998 Recap --Two Air Force procurements**
  - National Airmotive Corp. (Sept. 1998)
    - Readiness Concerns = Bundling Allowed
  - Pemco Aeroplex, Inc. (Sept. 1998)
    - Mere Convenience = Bundling Not Allowed

BUNDLING

- **Pemco: Oct. 6 1999; N.D. Alabama.**
  - CICA does not apply; 10 U.S.C. 2469a "supplants" rather than "supports" CICA
    - SECDEF "determines in writing that individual workloads cannot be logically and economically performed without combination"
    - CICA permits "restrictive provisions . . . as authorized by law"; 2469a is that authority
    - AF complied with 10 U.S.C. 2469a; not subject to further judicial review

BUNDLING

- **Even if CICA applies, GAO applied wrong "standard"**
  - Required AF to demonstrate "convincing relationship" between bundling/readiness
  - Proper standard is "substantial evidence"; "absent a record devoid of reasonable evidence, the agency's decision must stand"
    - Decreasing volatility of workload
    - Combining less attractive "commodities" workload with profitable KC-135 work
- **Under APA, agency decision is upheld unless it lacks rational basis or there is clear/ prejudicial violation of law**

BUNDLING

- **Possible alternative explanations for result:**
  - Pemco passed up opportunity to team; no bid was “poor business judgment”
  - PEMCO quoted the Spice Girls in arguing that the Air Force bundled because it “really [really] wanted” Privatization-in-Place
  - (See slip opinion at footnote 21)

FIXED PRICE CONTRACTS

- **Fixed Price Contract vs. Cost-Type MEO**
- **BMAR & Associates (Mar. 1999)**
  - Air Force civil engineering services RFP contained no historical data or estimates
  - Undue risk to contractor
  - Risk of overpayment (contingencies)
  - “Level Playing Field” concerns
  - Bad faith?

"COMPETITIVE METHOD" BEST VALUE

- **Propriety of comparing "best value" private proposal to "low cost" MEO**
  - If best value is used to select private proposal, MEO adjusted so it is "based upon same scope of work and performance levels"
  - Does post-proposal adjustment to MEO provide "second bite at apple"?
- **Why compare proposals submitted of different bases?**

BEST VALUE/DOD ISSUES

- **10 U.S.C. 2462a requires contracting with private sector if it can provide supply or service at lower cost.**
  - Does it require selection based on lowest cost?
  - Does it permits award to higher priced private sector proposal?
- **NWT, Inc., PharmChem, (Dec. 1998)**
  - NWT's challenge to propriety of BV based on 10 U.S.C. 2462 held untimely

BEST VALUE

- **“Leveling” MEO**
  - Revised Supplemental Handbook Approach
  - NWT, Inc., PharmChem, (Dec. 1998)
    - PharmChem argued that agency failed to ensure MEO offered same level of performance
      - No contemporaneous documentation regarding comparison.
      - PharmChem alleged MEO underestimated FTEs
      - Number of FTEs needed for MEO is “management decision” not subject to review unless made “fraudulently or in bad faith”

BEST VALUE

- **Suppose MEO Cannot Meet "Same Level of Performance and Performance Quality"?**
  - Ferguson-Williams, Inc., (Mar. 1999)
    - Army COE cancelled solicitation/removed requirements
    - Protest "academic"
  - Should an agency be required to award to the private sector offeror in such cases?

MEO COST ADJUSTMENTS

- **Govt Mistakes/Misunderstandings**
  - Madison Serv. Inc. (Nov. 1997)
    - MEO Proposed $0 for supplies
    - Adjustments at base and MAJCOM level akin to "discussions"
    - Failure to consider lower SCA rates
  - Symvionics, Inc. (Mar. 1999)
    - Air Force did not "seal" its MEO; no prejudice
    - Errors in MEO corrected (e.g., elimination of multiple "volunteers" and replacement with single FTE); no prejudice

ADMINISTRATION COST ADJUSTMENTS

- **Contract Administration Costs**
  - Measuring “real world” costs?
  - Line 8 of Cost Comparison Form
  - RTS Travel Service (Sept. 1999)
    - Air Force Base Travel Services = 4 FTEs
    - Proposed Contractor Price = $821,262 vs. MEO $910,000
    - $122,555 Upward Adjustment for .5 FTE at GS-7 (for multiple years)
- **Should the Solicitation Notify Offerors of the Administrative Cost Adjustment?**

ADMINISTRATION COST ADJUSTMENTS

- **Space Mark (Nov. 1999 COFC)**
  - MEO at $18.2 million vs. Space Mark at $15.3 million, prior to adjustments; after adjustments Space Mark $254,000 higher
  - AF Failed to publicly disclose changes in MEO after receipt of Space Mark proposal
  - Right to correct errors absent “clear proof of bad faith”
  - Line 8 adjustments:
    - 3 GS-12 Quality Assurance Reps
    - Relocation costs for 12 employees
  - Adjustments not arbitrary and capricious

CONFLICTS OF INTEREST

- **Government evaluating Government**
  - DZS/Baker LLC, (Jan. 1999)
    - Both private sector offers ruled “Technically Unacceptable”
    - 14 Out of 16 Air Force evaluators held positions under study
  - OGE Memorandum (Sept. 1999)
    - Interpreted 5 C.F.R. 2640.203(d), a regulatory exemption to 18 U.S.C. 208, a criminal statute regarding conflicts interest, to permit what occurred in DZS/Baker

CONFLICTS OF INTEREST

- GAO letter to OGE, Nov. 19, 1999
  - FAR 3.101-1: procurement officials must act “in a manner above reproach” and “avoid strictly any conflict of interest or even the appearance of a conflict of interest”
  - “Except as authorized by statute and regulation” language in FAR 3.101 contemplates set-asides
  - Must “do more than merely refrain from violating a criminal statute”
- DoD Interim Guidance expected soon

PROCEDURAL INEFFICIENCIES

- **Debriefings (FAR Part 15)**
  - Omni Corp. (Dec. 1998)
    - Debriefing Requested Prior to Final Award; But After Tentative Award
    - Agency May Wait Until Final Decision
      - After private competition; public/private competition and A-76 appeal(s)
      - Why?: "In house" estimate could change
- **Canceled Solicitations**
  - Withdrawn protest: AF cancelled solicitation and converted without cost comparison
  - Southwest Anesthesia: "Pretext" rule

FAIR ACT APPEALS

- **Numerous appeals filed both by industry associations and employee unions**
  - Appeals focused on designation of activities as “core”
  - Agencies interpret appeal under FAIR Act as being limited to what is or is not inherently governmental
  - Overwhelming of appeals have not been sustained
- **No judicial challenges to date**

EMPLOYEE BID PROTESTS

- **GAO: Norman Currier (Dec. 1999): Neither government employees or the MEO are "interested parties"**
- **Courts:**
  - 6th Circuit (split)
  - No Injury in Fact (Too Speculative)
  - No "Standing"/Not Within "Zone of Interest"
  - Decision Devoted to Agency Discretion